No. 3921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. A. FOSBURGH, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

vs.

CALIFORNIA and HAWAIIAN SUGAR REFINING COMPANY (a corporation), THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA (a corporation), and CANTON BANK [of San Francisco] (a corporation),

Appellees.

Upon Appeal from the Northern District of California.
Honorable Benjamin F. Bledsoe, D. J., Presiding.

BRIEF FOR APPELLEE.

(CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY.)

DONALD Y. CAMPBELL,
GARRET W. MCENERNEY,
Attorneys for Appellee Sugar Company.

INDEX.

The Facts.

Argument.

TABLE OF CASES CITED.

No. 3921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

James B. A. Fosburgh, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

vs.

California and Hawaiian Sugar Refining Company (a corporation), The First National Bank of San Francisco, California (a corporation), and Canton Bank [of San Francisco] (a corporation),

Appellees.

Upon Appeal from the Northern District of California.
Honorable Benjamin F. Bledsoe, D. J., Presiding.

BRIEF FOR APPELLEE.

(California and Hawaiian Sugar Refining Company.)

The Facts.

(a) The Case in Outline.

This is an appeal from a decree in equity dismissing a bill of complaint upon the merits after final hearing

(R. 107; for opinion see 270 Fed. 302, R. 90, 344). Subsequent to the entry of the decree the original complainant became bankrupt (R. 112) and the appeal is prosecuted by its trustee (R. 110).

The suit (brought December 1, 1920) was an attempt by a purchaser of sugar to effectuate its repudiation of a contract of purchase and sale made by two writings dated May 14 and 18, 1920, which were executed and exchanged together (R. 237, 236) and made a single contract.[1]

The concrete purpose of the suit was to enjoin the seller from collecting for the sugar under irrevocable letters of credit issued to it by Chicago banks although under the authorities these letters of credit created contracts between the banks and the seller only, which were independent of and distinct from the contract of purchase and sale between buyer and seller, as will later appear. (The Chicago banks were out of the jurisdiction and not sued; the complainant claimed that they were not necessary parties.)

The suit was one of many brought throughout the country with similar purpose in the fall and early winter of 1920 by persons and concerns who had purchased sugar in the spring of 1920 for future delivery when the world price was high and who had heavy

---

1 Section 1642, Cal. Civil Code;
Flinn v. Mowry, 131 Cal. 481, 484;
Cobb v. Doggett, 142 Cal. 142, 144.

Although it is our contention that these two writings made but a single contract, the bill of complaint treated the writings as creating two contracts and therefore following the position of the appellant here, we discuss the transactions involved as though the writings were in legal effect two contracts, although we claim that in legal effect they created but a single contract. This question is of no real importance in the case and we note it largely in the interest of clearness.

losses staring them in the face in the fall as the result of a marked drop say, of 60% in price.[2]

The original complainant, Continental Candy Corporation operating in Chicago, Jersey City and New York (hereinafter called the candy company) was the purchaser, and the appellee California and Hawaiian Sugar Refining Company (hereinafter called the sugar company) was the seller. The appellee sugar company is a dealer in sugar, has its office in San Francisco and operates a large refinery at Crockett on San Francisco Bay where it refines raw sugar most of which is cane sugar and comes from Hawaii (R. 154, 205-206).

The candy company was incorporated May 1, 1919, and succeeded to and enlarged the business of an earlier candy company (R. 216, 207). The earlier candy company had been a customer of the sugar company, and the candy company, original complainant here, had been one of the customers of the sugar company in the year 1919 after its incorporation on May 1st (R. 170-171).

---

2 *El Reno Grocery Co. v. Lamborn & Co.* (decision by Justice Cohalan of the Supreme Court of New York, published in the New York Herald of Friday, December 17, 1920, page 22, column 3) was a suit by the grocery company to restrain the importers (Lamborn & Co.) from collecting on letters of credit issued to assure payment on sugar contracts. The petitioners for the injunctions contended that the contracts had been broken because the sugar was shipped in a vessel other than the one specified in the agreement, whereas the defendants asserted that the attempted repudiation of the contracts was due to the fall in the price of sugar.

In his opinion denying an injunction for the reason that the plaintiffs had an adequate remedy at law, Justice Cohalan said:

> *"There are before the court twenty-four motions for injunctions pendente lite in equity cases brought for the cancellation of certain contracts for the sale of sugar which the plaintiffs have attempted to rescind. The decision of this application is decisive of the twenty-three other motions."*

In addition to the twenty-four cases mentioned by Mr. Justice Cohalan many others will be found listed in this brief.

Early in 1920 owing to crop reports, etc. forecasting a world shortage and owing to strikes in Hawaii which were reducing its own normal importation of sugar (R. 157-158) the appellee sugar company "bought sugar to aid our customers to have sufficient supplies" (R. 159), i. e., 10,000 (long) tons of Java White sugar to be shipped from Java to San Francisco Bay in August (3000 tons), September (3000 tons) and October (4000 tons) (R. 157-158). The American housewife will not ordinarily use this sugar on her table owing to its grain and appearance and it is rarely imported into the United States; indeed, in America it is only suitable for use in the manufacture of commodities containing sugar (R. 156, 158-159, 154).

Continental Candy Corporation was engaged in the manufacture of candy and confectionery of all descriptions (R. 207) and therefore a large user of sugar. In May, 1920, at one time and by two instruments dated respectively May 14 and 18, 1920, the candy company purchased from the sugar company, one-eighth of the 10,000 tons of Java White sugar already mentioned, i. e., 1250 tons (2240 pounds to the ton) for shipment from Java, 250 tons in September and 1000 tons in October at 19.85 cents per pound f. o. b. San Francisco, or a total of $555,800. (The market price of refined sugar May 14-18, 1920, was 22.75 cents per pound—R. 157, 162.)

Under the terms of each of the two contracts of purchase and sale the candy company was required to furnish the sugar company with "irrevocable" letters of credit through San Francisco banks for the full

amount of the purchase price, and it therefore procured two letters of credit addressed to the sugar company, one by the First National Bank of Chicago for $300,000 and another by the Great Lakes Trust Company (of Chicago) for the balance of the entire purchase price, or $255,800. (These Chicago banks made arrangements with San Francisco banks as appears later.)

By the terms of these letters of credit, it was provided that the banks named would against shipping documents, etc. pay drafts drawn by the sugar company if the drafts were drawn, etc. before December 31, 1920.

The contracts of sale and purchase and the letters of credit read as below.

Contracts of Sale and Purchase dated May 14, 18, 1920.

The first contract was for 750 tons and the second contract for 500 tons to be shipped from Java—250 tons in September and 1000 tons in October. In the parts pertinent to this appeal the contracts were identical (R. 22-24), and as follows:

> "1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars: * * * FOB cars San Francisco, California. * * *
>
> 2. Payment. Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller. * * *
>
> 6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.''

This brings us to the text of the two Chicago letters of credit.

The Two Chicago Banks' Letters of Credit.

''Chicago, Ill., June 1, 1920. (Addressed by Great Lakes Trust Company to appellee sugar company) Our Com'l Credit No. 1073. For account of the Continental Candy Corporation of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding $255,800.00 * * * to cover Dutch standard 25 refined sugar 99% test, to be shipped from Java during September and/or October, 1920. Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be $19.85 per 100 lbs. f. o. b. San Francisco. This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date. We hereby agree with the makers, endorsers and bona fide holders of all drafts drawn under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank * * *. Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco.'' (R. 275-276.)

''Chicago, June 2, 1920, (Addressed by the First National Bank of Chicago to appellee sugar company) No. G. C. A6385. We hereby authorize you to value on The First National Bank of Chicago, at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U.

> S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard at $19.85 per 100 lbs. FOB San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920. The Bills of Lading must be issued to the order of Shippers and endorsed in blank. The Shipment must be completed and the Bill drawn on or before December 31, 1920, and sent to The First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored. * * * We hereby agree with drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago. This credit is confirmed and irrevocable. * * * If desired, drafts under this credit will be paid at the counter of the First National Bank, San Francisco, Calif." (R. 274-275.)

As the contract of purchase and sale between the candy company and the sugar company required "an irrevocable letter of credit through San Francisco bank" it became necessary for the Chicago banks to arrange for the payment of the drafts in San Francisco. Accordingly, on June 3, 1920, the First National Bank of Chicago requested the First National Bank of San Francisco to confirm its letter of credit and to advise the seller that it (the First National Bank of San Francisco) was prepared "to pay" drafts. Seemingly the Great Lakes Trust Company of Chicago requested the Canton Bank of San Francisco merely "to negotiate" drafts against its letter of credit and to

advise the seller that it would do so.[3] These arrangements resulted in letters to the seller from the two San Francisco banks reading as below.

Letters of the Two San Francisco Banks.

> "San Francisco, June 8, 1920. (Addressed by The First National Bank of San Francisco to appellee sugar company.) We have received from the First National Bank, Chicago, copies of your Letters of Credit, No. G. C. A6385 and * * * for $300,000 and * * * respectively, both issued in your favor. These credits are irrevocable and are hereby confirmed, and we stand in readiness to pay your draft drawn under their provisions." (R. 34, 137.)

> "San Francisco, August 13, 1920. (Addressed by the Canton Bank to appellee sugar company.) Re: Commercial Credit No. 1073 issued by The Great Lakes Trust Co., Chicago. * * * Assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of this credit, we remain," etc. (R. 319-320.)

After the contracts had been made and the letters of credit issued, conversations occurred between the buyer and the seller looking to modifications of the contracts in minor particulars. These conversations all

---

3 It is not important here to consider the difference in liability assumed by the First National Bank of San Francisco "to pay" drafts and that of the Canton Bank of San Francisco "to negotiate" drafts. The former bank intended to confirm the letter of credit of its Chicago correspondent and acted upon that basis throughout the litigation. The Canton Bank withdrew its promise "to negotiate" drafts, thereby assuming that it was open for it to do so. In the events which happened, we need not now concern ourselves with that question, nor with the question whether or not the arrangement of the Great Lakes Trust Company made with the Canton Bank satisfied the requirements of the contract of purchase and sale.

proceeded upon the assumption, of course, that the contracts were valid and in force and would be lived up to by the parties. The conversations dealt with the subjects following:

(1) About August 13, 1920, there was a suggestion concerning the substitution of granulated sugar for Java White sugar (R. 174, 239, 319);

(2) A few days prior to August 24, 1920, the contracts were modified so that the words "f. o. b. cars, Crockett, California," were substituted in lieu of "f. o. b. cars San Francisco, California" (R. 7, 37, 47, 240, 320);

(3) September 2, 1920, there was a suggestion by letter from the candy company to the sugar company that it would be accommodated by having the shipments from Java delayed (R. 174-175, 238-239); and

(4) October 4, 1920, there was a requirement that the certificate of inspection of a named person should be included in the shipping documents (R. 320-321).

The sugar began to arrive in San Francisco Bay November 23, 1920 (R. 16), and shortly before this date sugar having fallen more than 50% of its May price[4] the candy company consulted its Chicago counsel with a view to the repudiation of its obligation to purchase (R. 243 foot; 162-163).

[4] At the dates of the contracts, May 14, 18, 1920, the price of refined sugar was 22.75 cents per pound (R. 157), whereas on November 23, 1920, it was 9 cents per pound, and continued to fall (R. 162-163). All sugars, including Java White sugar, fell in the same ratio (R. 163).

The first suggestion, however, by the candy company to the sugar company that it proposed to repudiate its contracts occurred November 27, 1920, when a Chicago brokerage house, through which the sugar had been sold to the candy company, telephoned the latter advising it of the arrival of a portion of the sugar in San Francisco. Thereupon the president of the candy company told the brokerage house that the Chicago attorneys for the candy company were in San Francisco about to commence suit to prevent payment upon the letters of credit because clauses 6 and 7 of the contracts of purchase and sale were illegal (R. 244-247). The brokerage house immediately telegraphed this conversation to the sugar company at San Francisco (R. 247).

The clauses referred to by the candy company were these:

> "6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.
>
> 7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year." (R. 23.)

Buyer's Notice of Rescission, etc.

Four days later (December 1, 1920) the Chicago counsel for the candy company served upon the sugar company in San Francisco a notice in respect of each contract, which notices were identical except as varied to cover the difference in the quantity purchased un-

der the two several contracts. The first of these notices was as follows:

> "November 30, 1920. [Addressed by the candy company to the sugar company] You will please take notice, and you are hereby notified, that the contract entered into on the 14th day of May, 1920, between you and Continental Candy Corporation covering the sale by you of 750 tons * * * of white Java sugar * * * as subsequently amended to provide for delivery f. o. b. cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.
>
> "The said contract is so rescinded, cancelled and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest and policy, and because it is in violation of the anti-trust laws of the United States governing trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.
>
> "You are further notified and advised that said contract is unilateral and is, therefore, nudum pactum and wholly unenforcible.
>
> "Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.
>
> "Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.
>
> "You are further notified that said Continental Candy Corporation hereby rescinds, cancels and

> declares to be null and void the said entire contract of May 14th, 1920, because you have failed to comply with the material provision of said contract requiring shipment from Java in September, 1920, of 250 tons of said sugar.
>
> "You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and advised not to value or draw under any of the Letters of Credit furnished you under said contract." (R. 280-282.)

On the same day (December 1, 1920) the Bill of Complaint was filed against the sugar company and the two San Francisco banks with an allegation that the Chicago banks

> "are not necessary parties hereto, and neither of them is made a party hereto because neither of them is within the jurisdiction of this Court and process of this Court cannot be served upon either of them." (R. 8.)

An order to show cause and a temporary restraining order were procured on December 1, 1920. The hearing resulted in an order of temporary injunction, December 8, 1920 (Honorable Frank H. Rudkin, D. J.) whereunder the sugar company was still at liberty to fulfill the terms of its contract with the candy company and to draw its drafts against the Chicago banks but forbidden to collect the money. It was provided, however, that nothing in the order should be treated as an injunction forbidding the San Francisco banks from paying the drafts to Walter B. Maling, appointed Special Master with power to receive payment (R. 296-304).

As a condition to the entry of the order of temporary injunction on December 8, 1920, the plaintiff agreed that the final hearing should be had December 27, 1920 (R. 303), and the cause was heard on December 27th and December 28th, 1920, before Honorable Benjamin F. Bledsoe, Judge, and resulted in a final decree dismissing the bill for want of equity (R. 107-109).

Having given an outline of the case it will be next in order to consider the theories upon which the candy company proceeded and how it attempted in the court below to make effectual its repudiation of its contracts.

(b) The theories of complainant below and here.

In its bill of complaint the candy company claimed that the contracts of May 14, 18, 1920, had been rescinded, cancelled and terminated by it and that they were in effect non-existent (R. 15) because (a) there had been a breach of performance by the sugar company; (b) there were integral provisions of the contracts which were so indefinite and unenforcible against the seller that the buyer was entitled to withdraw from the contracts at pleasure before performance; and (c) there were integral provisions of the contracts which were illegal and therefore the contracts were themselves illegal.

In its bill of complaint the candy company asked for an injunction which, if granted, would have made it impossible for the sugar company to comply with the prerequisites to drafts against the letters of credit—

for instance, it sought an injunction (and had a restraining order effective December 1-8, 1920) whereby the sugar company was forbidden to load the sugar on railroad cars at Crockett destined for Chicago. And yet the sugar company had to load the sugar on the cars and obtain bills of lading therefor, in order to comply with the terms of the letters of credit and these had a time limit of December 31, 1920 (R. 274-276).

In order to support its claims to the remedies applied for, the complainant had to formulate theories respecting (a) the unenforcibility and illegality of the contract of purchase and sale of May 14, 18, 1920; (b) the status of the letters of credit issued by the two Chicago banks; and (c) certain questions of procedural law. All of these theories were indispensable to a recovery by the complainant and it will be helpful to an understanding of the case if we briefly deal with them.

(1) The alleged illegality and unenforcibility of the contracts of May 14, 18, 1920.

Six objections to the contracts were made in the bill of complaint and one additional was suggested at the final hearing, although not mentioned in the bill of complaint. The seven objections were these.

(a) The shipment from Java was not in time (R. 14-15, 58; notice served December 1, 1920, supra p. 10)—an objection abandoned at the trial (R. 126, 279);

(b) Although the contracts (R. 22-25) provided for shipment from Java in September and October, 1920, and although the letters of credit required the drafts

to be drawn and the shipping documents to be ready on or before December 31, 1920, there was no time specified for the loading of the sugar on board cars after its arrival in the bay of San Francisco, and therefore the contracts were unilateral and the buyer was at liberty to withdraw therefrom at pleasure before performance (R. 14, 57)—a point which overlooked the fact that it is everywhere the law that a reasonable time is intended where no time of performance is specified, and that this is the California law (Section 1657, C. C. Cal.) by which the contracts are controlled (R. 210, foot; also 236-237);

(c) The provision which authorized the seller to cancel the contracts "should strikes, wars, revolutions, accidents, dangers of the sea, or other unforeseen events beyond control, prevent shipment or delay delivery" (R. 14, 23) enabled the seller to withdraw from the contracts at pleasure and gave the buyer a like privilege (R. 14, 56-57)—an argument which overlooked the fact that such a clause has been repeatedly upheld;

(d) The provision of the contracts that "in the event of any dispute arising under this contract, same to be settled by San Francisco arbitration" rendered the contracts illegal as ousting courts of jurisdiction of disputes (R. 13, 54-55), as though it were an attack upon courts to settle disputes out of court. This objection also overlooked the fact that agreements to arbitrate are expressly authorized in California (Sections 1281-1290, C. C. P. Cal.), and indeed everywhere;

(e) Clause 6 of the contracts that:

> "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

violated anti-trust laws (R. 11, 12, 49, 54)—a point which ignored the fact that it was held the other way in *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165 (1915), which we refer to later in this brief;

(f) Clause 7 of the contracts that:

> "sales of this sugar to [buyer] manufacturers constitutes their quota of sugar from [sugar company] * * * from delivery date * * * until the end of the year."

was likewise illegal (R. 11, 49, 54)—a point which overlooked the fact that the sugar company might have refused to sell any sugar whatever to the candy company and that the latter might have refused to buy any sugar, and therefore there could be no illegality in such an agreement.

(g) The seventh point was suggested at the final hearing but not mentioned in the bill of complaint, i. e., that the sugar company was "a monopoly in fact" (R. 146-147) and therefore could not enforce even a valid contract made by it—a point which also overlooked the fact that it was held in *Wilder Manufacturing Company v. Corn Products Refining Company*, 236 U. S. 165 (1915) that such a point was not available to a litigant similarly situated.

All of these propositions except two—"e" and "f" have been abandoned on the appeal. The plaintiff's

case, so far as the illegality of the contracts of purchase and sale are concerned, turns on the clauses:

> 6. "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same"; and
>
> 7. "sales of this sugar to manufacturers constitutes their quota of sugar from [sugar company] * * * from delivery date * * * until the end of the year."

Indeed, in the brief for appellant no point is expressly made respecting Clause 7 but the clause is introduced into the discussion at page 10, and we shall therefore treat it as a point made by the appellant.

(2) The position of the letters of credit

If there had been no letters of credit in the case the candy company would have found it impossible to state a cause of action in equity for the reason that if its legal position were sound it would have had a full defense at law against any action on the contracts which the seller might bring. Recognizing this to be so, the candy company made its cause of action in equity turn upon the letters of credit. The candy company claimed that the Chicago banks were legally bound to pay the drafts drawn by the seller, even if the contracts between buyer and seller were illegal; that the candy company was legally bound to reimburse the Chicago banks for any moneys expended under their letters of credit; and hence the seller should be enjoined from drawing drafts under the letters of credit. The sugar company also claimed that the Chicago banks were bound to pay the drafts drawn by it even if the contracts

between the candy company and the sugar company were illegal. This contention by the sugar company is based upon the proposition now to be stated.

The letters of credit created contracts between the bank and the seller only which were independent of and distinct from the contracts of purchase and sale between buyer and seller. The contracts created by the letters of credit did not include clauses 6 and 7 of the contract of purchase and sale, and therefore if those clauses invalidated the contract between buyer and seller they did not invalidate the contracts between the banks and the seller because the contracts created by those letters of credit did not include clauses 6 and 7.

We are not certain that the candy company admits that abstractly letters of credit create contracts between a bank and a seller independent of and distinct from the contract of purchase and sale between buyer and seller. The candy company took no forthright position upon this point either way, but seemed to rest its case upon the proposition that the Chicago banks were legally bound to pay the drafts drawn by the sellers because they did not know of the existence of clauses 6 and 7 when they issued their letters of credit. The bill of complaint therefore alleged that when the banks issued their letters of credit to the sugar company they were not aware of all of the provisions of the contracts of purchase and sale (R. 7, foot). The complaint does not allege in terms that either bank was ignorant of the fact that the contracts of purchase and sale contained clauses 6 and 7, but the presi-

dent of the candy company gives testimony from which this conclusion may be argumentatively deduced (R. 211, 237).

In dealing with the letters of credit the complainant was involved in a dilemma. Once it was admitted that the contracts between the banks and the seller were distinct from the contract between buyer and seller the obligation of the banks to pay arose from the circumstance that they had made valid contracts with the seller. On the other hand, if it were argued by the complainant that the letters of credit were incidental to the contract of purchase and sale it would be forced also to argue that if the contract of purchase and sale was invalid the contracts created by the letters of credit were also invalid. And against this latter argument it could be said that even if the banks did not know when they issued their letters of credit that they were infected with illegality it would have been an easy matter for the candy company to inform them of the terms of the contract of purchase and sale and to warn them that any payments made under the letters of credit would be voluntary and that the candy company would not be bound to reimburse the banks therefor.

(3) The questions of procedural law here involved.

There are two questions of procedural law here involved (a) whether a case in equity was stated by the complainant even assuming for the purposes of this point that the contracts had been successfully cancelled, etc. by the candy company; and (b) whether the Chicago banks were indispensable parties to the suit.

We have already made sufficient mention of the first of these points and respecting the second we might say that the bill of complaint alleged that the Chicago banks were not necessary parties (R. 8), and that the sugar company by motion to dismiss the bill and in its answer set up non-joinder of the Chicago banks claiming them to be necessary and indispensable parties (R. 30, 48, 78). This same defense was set up in the answer of the First National Bank of San Francisco (R. 40).

The foregoing propositions will be fully discussed later in the brief, but in this connection we here note the fact that as the Chicago banks have since the entry of the final decree paid our drafts drawn under the letters of credit the case is now moot.

(c) The government's control over the necessaries of life, including sugar, from August 10, 1917, to November 15, 1920.

Under the Food Control (Lever) Act, approved August 10, 1917 (40 St. 273) and an executive order of the President of the same date, the United States Food Administration was created and Herbert Hoover appointed United States Food Administrator. On August 15, 1917, George M. Rolph was appointed Chief of the Sugar Division and so remained until his resignation February 15, 1919 (Bernhardt's Government Control of Sugar, pp. 10, 73; also R. 170).

After a tenure of two years Mr. Hoover resigned and the President on November 21, 1919, conferred the

powers of the United States Food Administrator "in so far as they applied to wheat and wheat products" upon Julius H. Barnes, Chief of the Cereal Division of the United States Food Administration and all the other powers theretofore exercised by the Food Administrator upon the Attorney General (R. 186-190).

The powers and authority thus conferred upon the Attorney General, which included the surveillance of sugar, continued at least until November 15, 1920, when the requirement of licenses to trade in the necessaries of life, including sugar, was abrogated by a proclamation of the President (R. 202-205).

The Food Control Act above mentioned (40 St. 273), provided, among other things, that:

The Food Control (Lever) Act.

> "It is essential to the national security and defense * * * to assure an adequate supply *and equitable distribution,* and to facilitate the movement of foods * * * to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, *effecting* such supply, *distribution, and movement;* and to establish and maintain governmental control of such necessaries during the war." (R. 203.)

And also provided

> "that, from time to time, whenever the President shall find it essential to license the importation, * * * or distribution of any necessaries * * * and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on such business * * * unless he shall secure and hold a license issued pursuant to this section." (R. 203.)

In pursuance of the said act of August 10, 1917, the President by proclamation required dealing in sugar to be licensed (United States Compiled Statutes, 1918, page 436).

Proclamations of the President.

> "September 7, 1917. All persons, firms, corporations and associations engaged in the business either of importing sugar, or manufacturing sugar from sugar cane or beets, or of refining sugar or of manufacturing sugar syrups or molasses, * * * are hereby required to secure on or before October 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of the business as may be prescribed. Applications for licenses must be made to the United States Food Administrator, Washington, D. C., upon forms prepared by him for that purpose."
>
> "October 8, 1917. All persons, firms, corporations and associations engaged in the business either of * * * importing, manufacturng * * * or distributing (including buying and selling) any of the following commodities * * * sugar, syrups, or molasses * * * are hereby required to secure on or before November 1, 1917, a license, which license will be issued under such rules and regulations governing the conduct of the business as may be prescribed. Application for license must be made to the United States Food Administration, Washington, D. C., Law Department—License Division, on forms prepared by it for that purpose, which may be secured on request."

Sugar Company Had Sugar License.

On October 3, 1917, the appellee sugar company was licensed by the United States Food Administration to deal in sugar and held such a license until all licenses were abolished by proclamation of the President, effective November 15, 1920 (R. 202-205).

General Regulations of Food Administration.

On November 1, 1917, the Food Administration promulgated general rules to control the sugar trade (R. 179-184), among others, Rule 6 reading as follows:

> "Rule 6. *Resales Within Same Trade Prohibited, When.*—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to results in a higher market price to the retailer or consumer, will be dealt with as an unfair practice." (R. 181.)

These rules continued in force after the Attorney General assumed the exercise of the powers conferred upon him by the President November 21, 1919.

While the Food Administration was in charge the government incorporated the United States Sugar Equalization Board, Inc. under the laws of Delaware on July 12, 1918, and was its only stockholder. The act of December 31, 1919 (41 St. 386) authorized it to continue its corporate existence until December 31, 1920.

Attorney General's Authority Over Sugar.

As already stated, the Attorney General's authority dates from November 21, 1919, and with his assumption of these duties the Attorney General appointed Howard Figg, Special Assistant in carge of the enforcement of the Food Control Act (R. 324), also Allison L. Newton as attorney in charge of the licensing division (R. 335), and J. G. Weatherly "in charge of the Fair Price Commissions throughout the United

States'' (R. 324), which were organizations of men and women co-operating with the Department of Justice to maintain fair prices and equitable distribution of necessaries of life in times of stringency (R. 168 foot, 170). The Attorney General looked to the United States Attorneys throughout the country for the enforcement of these laws and regulations.

> ''The chain of authority * * * so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney General, and such reports were passed upon by A. L. Newton, who approved or disapproved, as the case might be, and passed them on up for the attention of the Attorney General.'' (J. G. Weatherly, R. 338-339.)

The importance of governmental regulation of sugar even in the year 1920 is shown by a review of the whole situation at pages 180 to 185 of Attorney General's Report, 1920 (R. 308-318), and by the following self explanatory letter (R. 176-177) which came to the knowledge of the sugar company prior to May 14, 1920, through its dissemination to all dealers in sugar and its publication in all sugar journals (R. 178).

> ''Department of Justice, Washington, D. C., April 29, 1920. The American Sugar Refining Company, New York City. Gentlemen: It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices.

The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

I shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which prohibits resales within the trade. I herewith quote for your information, as well as for that of your trade, this Rule:

'Resales within same trade prohibited, when.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.'

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers. Yours very truly, (Signed) Howard Figg, Special Assistant to the Attorney General."

In connection with the governmental surveillance of the sugar trade as affecting the particular contracts here involved, it is to be noted that the candy company had no license to deal in sugar until September 9, 1920, and it never applied therefor until June 30, 1920 (R. 221, 194). The president of the candy company stated that he was advised that a license was not needed by his company, but this could be so only for the reason that the candy company was a mere user

of sugar and if it did not buy beyond its requirements it would not be in the market selling sugar.

(d) The 10,000 tons of Java White sugar imported in 1920 and why the contracts contained the clauses which are here attacked.

Early in 1920 as already stated there was a threatened shortage of sugar and prices were high. Owing to strikes in the Hawaiian Islands the sugar company calculated that its supply for the year would be short and in order to provide for the requirements of its customers it bought 10,000 tons of Java White sugar which was being imported from Java. This sugar is not suitable for household use in America, but serves the purpose of manufacturers.

The Department of Justice requested the sugar company to sell this sugar to manufacturers for manufacturing needs only, and it did so. In order to insure the object which the Department of Justice had in mind (the equitable distribution of the sugar) the sugar company introduced into the contracts at the request of the Department of Justice a clause that the sugar was sold for the buyer's own consumption and not for resale, and that it was understood between the parties that no additional sugar would be obtainable by the buyer from the seller between the date of delivery and the end of the year. Three witnesses cover this phase of the case: (1) Andrew A. Brown, sales manager of the sugar company; (2) E. B. Montgomery who was a regular employee of the Department of Justice, in the Bureau of Investigation, and had been assigned to assist Mrs. Adams in the supervision

of the sugar trade (R. 255-256); and (3) Mrs. Adams herself who was United States Attorney from July, 1918, to June 26, 1920 (R. 255). On one phase these witnesses are corroborated by the president of the candy company whose testimony we quote. We also quote the testimony of J. G. Weatherly quoted from in the brief of appellant.

Testimony of A. A. Brown, Sales Manager of the Appellee Sugar Company.

The unsuitability of Java White sugar for American trade is made clear by Mr. Brown's testimony as follows:

> "There has been no Java White Sugar, or any other Java sugar, come into this country for years, although I think we bought a cargo in 1911. (R. 156) * * * The sugar that comes from Java is a washed sugar, known as Java Whites. They don't run through the bone coal process. It is not considered refined sugar (R. 157) * * * Java White in its nature is not similar to sugar used in households in this country. * * * [The difference consists] in its general large grain and appearance. There has been no trial of it in households because it has not been shipped to this country for a great many years until this year. It is made from cane and is a wash process, primarily made for the East Indian market, because the East Indian will not use refined sugar [produced by a purification of the sugar through the use of bone coal, a calcined animal charcoal (R. 154)], the ox being a sacred animal, they will not touch it. During the period of shortage it was diverted all over the world. It has the same percentage of sugar as refined, though not quite as white in color; the grain is larger and much coarser, and not pleasing to the eye, such as the American housewife wants. Java White sugar

> is primarily for the Indian market, or direct consumption in certain countries which have been using it for years, such as the Levantine nations and England for manufacture. It is suitable for manufacturing purposes such as canned fruits, outside of very white juice fruit, such as Bartlett pears; for peaches or for apricots, or for anything of that nature, having an ordinary dark juice, it would serve the purpose." (R. 158, 159.)

In explaining why the sugar company bought the 10,000 tons of Java White sugar, Mr. Brown testified:

> "[Early in 1920] all sugar people believed there was going to be a big shortage, it looked very much like it, especially early in April, when disquieting news came as to the condition of the Cuban crop; the market for raw sugar became very much excited; people plunged and bought everywhere all over the world for the United States." (R. 173.)
>
> "They had a strike in the Hawaiian Islands, sugar was not coming promptly. We bought sugar to aid our customers to have sufficient supplies." (R. 159.)

In explaining why clauses 6 and 7 were introduced into the contracts for the sale of the 10,000 tons of Java White sugar, Mr. Brown said:

> "Under instructions from the Department of Justice we refused to sell these 10,000 tons, or any part of it, and we wired our agent, declining to sell. Mr. Montgomery informed me about the orders coming from his superior in the Department of Justice, Mrs. Annette Adams. We refused to sell Java White sugar to wholesale grocers in the Middle West because we were instructed to confine the sale of Java Whites to manufacturers, in order to release a larger amount of our regular refined to the consuming public. Pursuing this course, it would enlarge the quantity of sugar available in

the household to the extent that the manufacturer could not call on me for my refined sugar. Not only through the directions of the Government, but as a sugar man, I knew that that would be the effect. By selling to manufacturers, and by forbidding them to resell, we sought to bring about the use of Java Whites by them which the householder would not take, owing to its forbidding aspect. [Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?] * * * As far as I know, it was merely trying to follow out the rules of the Department of Justice (R. 160-161). Clause 6 was put in to the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission, who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman. * * * Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar." (R. 168-169.)

Again, Mr. Brown testified:

"I am familiar with clause 7 which appears in the contracts of May 14th and May 18th, 1920. In taking this sugar for their requirements, they could not call on us for any more of our own sugar. That was supposed to be their quota, as far as we were concerned, from the time we delivered it, for the rest of the year. The allotments were a kind of a prior matter, in one sense, although at the time we did this, we were acting under orders, you

might say, of the Department of Justice. Clause 7 was introduced by the direction of the Government." (R. 164-165.)

Mr. Brown also testified:

> "Q. Are you sure that you made no contracts for Java sugar with anybody besides actual manufacturers? A. Yes, sir. Q. No wholesale grocers? A. Absolutely none. Q. And nobody in the trade except those that were going to use it? A. Except those that were going to use it. Q. Did you make any contracts with canners? A. Not for any of this sugar. Q. Were they all candy manufacturers? A. There were no canners. * * * The National Biscuit Company * * * took some. The Corn Producers Company took some. * * * None of it was sold for direct consumption, or to groceries. I can assure you of that." (R. 167-168.)

Mr. Brown also testified that these clauses did not appear in any contracts except the contracts respecting the 10,000 tons of Java White sugar.

> "The contracts for sugars refined by our company did not contain that clause [Clause 6 for buyer's own consumption, and against resale]. That clause was confined entirely to the specific 10,000 tons of Java Sugar sold at this one price [19.85 cents]. * * * We bought some [Java sugar] [in addition to the 10,000 tons] (R. 155). * * * We bought altogether * * * a little in excess of 11,000 tons white and 6000 short tons of raw Java. * * * We refined the balance of the white [1000 tons] and we refined the raw [6000 short tons]." (R. 155-156.)

Mr. Brown also testified:

> "Q. As I understand it, neither clause 6 nor clause 7 was in the contract whereby you sold your own refined sugar. A. No, sir. Q. But they were

introduced into this 10,000 ton lot? A. Yes, sir. Q. And you refined the extra thousand tons of Java White which you obtained, did you? A. Yes, sir. Q. So that never came into a Java White contract? A. No, sir." (R. 165.)

Speaking of the method of distributing the sugar, Mr. Brown testified:

> "We tried to distribute it fairly. Instead of allowing a man to select the quantity he wanted, we distributed it on past performance over the country in which we formerly did business. (R. 159-160.) * * * In making allotments of sugar we took a block of sugar, as the raws arrived, and in the refined form we allotted it all over the sections of the country where we did business, on the basis of past performance of the people to whom we allotted it, based on their past purchases; that is, such a percentage of what we had on hand as would be equal to the percentage of ratio which was established amongst them in the history of their purchases from us." (R. 163.)

Telegram May 5, 1920 Sugar Company to Brokers.

The foregoing is in harmony with the telegram sent by the sugar company to its Chicago brokers through whom the sale to the candy company was affected.

> "San Francisco, May 5, 1920. We have permission from the local authorities to sell the Java Whites with following restrictions First Sale to manufacturers only for their own manufacturing needs and under no circumstances are they to resell. Second Sales of this sugar to manufacturers to constitute their quota of sugar from us from delivery date of Java Whites until end of year. Stop * * * All shipment from Java in the months

named nineteen eighty-five net landed weights fob cars San Francisco. Letters of credit covering. Stop Under ruling must decline Kohl Grocer Quincy three hundred tons. Stop * * * In line our letter April twenty-third sale these sugars to manufacturers is expected to release later an equal amount of our output to jobbers.[5] Stop you have ample time to sell balance * * * Leave disposition balance in your hands." (R. 171-172.)

Testimony of Benjamin Schneewind, President of the Candy Company.

The above is in harmony with the statement made by the broker of the sugar company in May, 1920, as given in the deposition of the president of the candy company, as follows:

> "In May, 1920, prior to my conversation with Mr. Tennison, who represented the Seavey & Flarsheim Brokerage Company, we were unable to obtain any cane or beet sugar contracts for fall delivery at a fixed price. The Seavey & Flarsheim Brokerage Company are sugar brokers, representing the California & Hawaiian Sugar Refining Company, one of the defendants in this case. They have an office in Chicago, and also, I think, in St. Louis and in Kansas City. * * * The contracts attached to the bill in this case * * * dated May 14th and May 18th, 1920, respectively, were signed by me about on the dates they bear. The contracts were entirely drawn up and prepared before I saw

---

5 The effect of selling the Java White sugar to manufacturers for manufacturing needs only is here clearly brought out. Once the sugar company was able to satisfy the requirements of its customers who were manufacturers by selling to them Java White sugar upon the agreement that it would be used by them for their own manufacturing needs, the sugar company would be better able to serve the jobbers who, in turn, would sell the sugar to retailers or directly to ultimate consumers. In this way the scarcity of sugar for domestic consumption would be less severe. For definitions of "wholesaler", "jobber" and "retailer", see *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2nd Ct. 1915).

> them, and were presented to me by Mr. Tennison. After the first presentation to me of the contract of May 14, 1920, I asked Mr. Tennison why there was a clause in there restricting the sale, and why it was our quota from the California & Hawaiian Sugar Refining Company for the balance of the year; and he stated that they, the California & Hawaiian Sugar Refining Company, could not sell any sugar without those provisions in the contract. * * * I signed three copies of each contract and they were all sent to California for signature. I received one copy of each of them back, executed by the California & Hawaiian Sugar Refining Company, some time about the middle of June." (R. 208-210.)

Testimony of E. B. Montgomery of the Department of Justice.

We pass now to the testimony of Mr. Montgomery.

Mr. E. B. Montgomery was a regular employee of the Department of Justice, in the Bureau of Investigation, and had been assigned to assist Mrs. Adams in the supervision of the sugar trade (Mrs. Adams' deposition, R. 255-256).

In the course of his official duties Mr. Montgomery became acquainted with the officers of the sugar company early in 1920 (R. 248); was in the office of the company as often as two or three time a week (R. 254); and was familiar with the purchase of 10,000 tons of Java White made by the company, and its resale (R. 248).

Mr. Montgomery testified that prior to May 14, 1920, he dealt with the officers of the sugar company in respect of the matter of the sale by it of the 10,000 tons of Java White, and said that he had received his instructions from Mrs. Annette Adams and those in-

structions he communicated to Mr. A. A. Brown, Sales Manager of the defendant sugar company. What he told them was as follows:

> "I informed them that the United States Attorney had instructed me that the sale could be made, provided it was sold to manufacturers for manufacturing purposes only, and was not to be resold; also that the manufacturers purchasing the sugar would have to understand that it was their quota C. & H. [California and Hawaiian Sugar Refining Company] sugar for the year, and that the C. & H. [California and Hawaiian Sugar Refining Company] would observe that condition." (R. 253.)

Testimony of Mrs. Annette Abbott Adams, United States Attorney at San Francisco.

This brings us to the testimony of Mrs. Annette Abbott Adams, United States Attorney from July, 1918, to June 26, 1920, who had charge in San Francisco of the surveillance of the sugar trade under the direction of the Attorney General (R. 255) from a date earlier than January 1, 1920, to a date later than May 18, 1920. In explaining the whole situation, Mrs. Adams testified:

> "We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for dis-

tribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act. In order to do that, the cooperation of the refiners was necessary and important, and therefore we asked the refiners [to cooperate].

[Subsequent to the middle of April, 1920] Mr. Montgomery discussed with me the proposition of the Hawaiian Sugar Company selling some Java sugar to some manufacturers in the Middle West, and asked if we could have any objection to that sale. * * * and finally we agreed that we would offer no objection to their forwarding it if they would see to it that that sugar went into the hands only of the consumer. In other words, that it would not go into speculative channels. * * * And, therefore, that agreement was made by the sugar people, that if they sold this sugar that they would see to it that the sugar went into the hands of bona fide consumers and not the hands of dealers who would resell it. * * * In the term 'consumer' I include a manufacturer of candy. The ultimate consumer in our idea was the housekeeper and the manufacturer. * * * We regarded them as consumers. In general the rules and regulations were those that were laid down by the Food Administration, that sugar must go in a direct line from the refiner to the consumer; that if the sugar was sold to a manufacturer, it would go, might go, from the refiner direct to the manufacturer; if it was sold to a wholesaler, it must go from that wholesaler direct to a consumer, or to a retailer, and from the retailer it must go into the hands of a consumer, and that there should be no resale by any person to whom that sugar was sold as one in the chain of handlers. In making the statement

that there was no legal requirement, I am just quoting the rules and regulations * * * there was the hoarding provisions always in force. That was held to support us by our construction. Our construction was 'more than reasonable needs for a reasonable period'. * * * We only consented to this sale to the manufacturer on the understanding and assurance to us * * * that this was an ultimate consumer and not a seller. * * * We had to prevent * * * people from buying more sugar than they needed to meet their needs. * * * Our rule was to prevent him from securing a surplus, not to prevent him from selling it, but our rule was to prevent him from getting it in the first place * * * [Our] agreement with the refiners was that the refiners should not sell to persons who were not bona fide manufacturers. * * * I am stating what limitations were put upon the Hawaiian Sugar Company in selling this sugar to the Middle West people. * * * The Food Administration rules were in a sense in effect * * * We used them as a guide, and we required that the people should live up to those rules and regulations. Of course, if they wanted to engage in the sugar business, they had to secure a license. Licenses were issued from Washington, but, of course, application for license renewals in many instances came *thru* us, and we recommended or refused recommendations that they be granted." (R. 257-263.)

Speaking of the Act of December 31, 1919 (41 Stat. 386), and counsel's inquiry respecting the free distribution of sugar and the abolition of the policy of zoning, Mrs. Adams testified:

"We attempted equitably to continue the allotment that had been followed under the zone system. * * * We tried to distribute it [sugar] freely and in as fair ratios as possible; in other words, keep anybody from hoarding. * * *

[In the matter of resales within the trade] we would be interested in knowing as to how that man got that much sugar because he had gotton * * * more sugar [than he needed in his business]. * * * There were several instances where permission was requested from us to sell sugar that had over-accumulated. * * * We made requests [of the refiners] which we could not enforce. * * * We could ask them not to sell to John Smith any more than John Smith was entitled to equitably, and that is what we did do; * * * we asked them to distribute it to all of the wholesalers who were legitimate wholesalers, in proportion to their trade. * * * [If the sugar company insisted upon selling sugar in violation of this Act] their license, of course, might be taken away from them and that is a pretty good weapon. * * * We asked the refiners and the people whom we considered qualified to see that no man got more than his quota. In other words, that a proportionate amount of sugar was distributed and that there be no more than their ordinary business demanded. In other words, we wanted them not to sell to anybody that would hoard * * * and of course, in the manufacturing, that they should get no more than they needed for their legitimate manufacturing needs and that no buyer should buy more than his legitimate trade called for. * * * We were asked with regard to selling the sugar to a manufacturing concern, and we regarded them as an ultimate consumer. Of course, we considered them as the ultimate consumer under those conditions.'' (R. 264-273.)

Testimony of J. G. Weatherly.

J. G. Weatherly had been connected with the Department of Justice for some time prior to November 6, 1920, when he severed his connection therewith (R. 337). The Food Administration became a part of the work of the Attorney General November 21, 1919. Within

that period Mr. Weatherly had been an "assistant in charge of the Fair Price Commissions throughout the United States" (R. 324), but he had had nothing whatever to do with the supervision of United States attorneys when engaged in the work of the Food Administration. They reported to and were under the supervision of Allison L. Newton (R. 338, foot). In fact, Mr. Weatherly's only connection with the licensing of sugar and other dealers by the Department of Justice commenced long after the transactions here involved had occurred, i. e., from September 1, 1920, to November 6, 1920 (R. 337, 340, lines 13-16). Before that time, if not throughout the period just mentioned, Allison L. Newton, had immediate charge of the licensing division (R. 335, lines 5 to 8).

In view of the foregoing Mr. Weatherly's testimony that the Department of Justice did not authorize or insist upon the introduction of clauses 6 and 7 into the contracts of May 14, 18, 1920 (R. 328-329) is to be laid aside as the evidence of a witness not familiar with the subject-matter, particularly when the two witnesses who had charge of the matter (Mrs. Adams and Mr. Montgomery) testified to the contrary.

We quote the following testimony from the cross-examination of Mr. Weatherly which makes it clear that he had no connection with the Food Administration through the United States attorneys and that he was limited to the work of Fair Price Commissions.

> "I was not concerned immediately with the licensing provisions, that was not under my department. I was concerned with regulation of the licenses as

prescribed in the proclamation only in this way, that the Fair Price Committees were charged with the duty of, as far as possible, seeing that the licenses conformed to the Rules and Regulations, and with that idea in mind I issued instructions. * * * The chain of authority through the immediate office of the Department of Justice, so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney General, and such reports were passed upon by A. L. Newton, who approved or disapproved, as the case might be, and passed them on up for the attention of the Attorney General.'' (R. 337-339.)

Mr. Weatherly also testified:

''Q. Can you state along the same line whether you would consider the acquiring by a candy manufacturing company of more sugar than they needed for manufacturing in the nature of hoarding? A. If it were deliberately required, if they acquired a surplus supply, an abnormal supply, yes, it would be. The Department of Justice took steps to prevent such abnormal acquisition of supplies in excess of the real needs of the manufacturers who used sugar in their business, to the extent of warning the candy manufacturers against acquiring larger stocks than their business and conditions warranted, and to the extent of warning, or, rather, cautioning, or, better still, of asking the co-operation of the refiners in refraining from selling them an abnormal quantity of sugar, or quantities greater than their accustomed demands would warrant. Now, on that point, whenever the Department of Justice wanted the co-operation of the refiners to do thus and so, and to refrain from doing thus and so, in order the more effectively to control the sugar situation in accordance with the Act, I, or the Fair

Price Committee, or both, might call on the refiners in that matter, or it might come from the department, or the United States District Attorney, or Mr. [Howard] Figg [special assistant to the Attorney General in charge of these matters]. * * * I, personally, never asked the co-operation of the refiners to do any acts or refrain from doing any acts, but the Fair Price Commissioners did occasionally call on them for assistance in certain matters." (R. 341-342.)

(e) A number of facts other than those already mentioned bear upon the questions involved and those facts are here assembled.

(1) The total consumption of sugar annually in this country would be, roughly, 4,500,000 long tons, five-eighths for household purposes and three-eighths for manufacturing purposes. In the year 1919 the consumption was 4,098,000 tons (R. 161-162). In other words, the 10,000 tons of Java White sugar is a little less than one-fourth of 1% of all of the sugar consumed in this country in that year and the 1250 tons here involved is a trifle less than one thirty-second of 1% of the consumption.

(2) In 1920 when these contracts were made there were eighteen or twenty refineries in this country producing 3,750,000 long tons, and about one hundred beet sugar factories manufacturing about 1,000,000 short tons (R. 174).

(3) In 1920 the sugar company melted a little in excess of 400,000 short tons (R. 173). In other words, the 10,000 tons (long) of Java White sugar was less than 2.7% of the entire output of the sugar company for the year 1920, and the 1250 tons about one-third of 1% of the sugar company's output for that year.

(4) The candy company took over an established business and itself commenced business May 1, 1919, and during the first year of its corporate existence which ended April 30, 1920, it had used in its business approximately 12,000,000 pounds of sugar (R. 207). The president of the candy company was seeking sugar for its second business year which commenced May 1, 1920, but he found it impossible to obtain sugar for fall delivery at a fixed price elsewhere and that is why he bought the Java White sugar (R. 208-210). The purchase here involved was only one-fourth of the amount of sugar used by the candy company in the preceding year. 1250 tons of 2240 pounds makes 2,800,000 pounds. There was at the time, therefore, no question but that the candy company would have need of 2,800,000 pounds in its business, and therefore there was clearly no burden imposed upon the candy company in requiring it to covenant that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same". The candy company had no other sugar, which it had agreed not to resell (R. 235).

(5) When the candy company made the contracts of May 14, 18, 1920, it seemingly had no purpose whatever to sell any part of the sugar which it was purchasing for it had no license to sell sugar, had made no application for any such authority until June 30, 1920, and was not granted such authority until September 9, 1920 (R. 221, 194). It is said by the president of the

candy company that he had been advised that he needed no license, but he was not manufacturing or selling sugar —he was merely buying sugar to be used in making candy.

When the contracts of May 14, 18, 1920, were executed, the candy company was looking forward to a much larger business in its then second year than it had in its first year. These anticipations were justified for the months of May, June and July but the tide turned in August as will appear by the following table (R. 212-213).

	1919	1920
May		75% Increase
June	500,000	927,000
July	582,000	714,000
August	1,327,000	422,000
September	1,828,000	684,000

(6) The candy company in effect, affirmed and reaffirmed its contracts upon the several occasions to which we have referred (supra, pages 8-9), and it did not attempt to terminate the contracts until the "bottom" had fallen out of the price of sugar (see table of prices, R. 162-163).

(7) The candy company made no effort whatever to be relieved of its covenant that the sugar was purchased for its own consumption and not for resale, which adds proof that its later objection to the covenant

was not really a grievance but a subterfuge. The candy company was notified on November 27, 1920, that the sugar was arriving in San Francisco Bay and its counsel from Chicago was then in San Francisco preparing to repudiate the contracts upon the ground that the contracts were illegal (R. 245-247), inasmuch as therein the resale of the sugar was covenanted against. The candy company made no application to the sugar company to be relieved from the covenant (R. 238, 239) and made no application to the Department of Justice for such permission. It is also to be kept in mind that on November 15, 1920, the licensing of dealers in sugar had been terminated by Presidential proclamation (R. 202-204).

(8) The sugar company bought the Java White sugar in a period of high prices and to guard against loss and in conformity with usage it resold, in all probability immediately. The candy company desired the sugar, bought at high prices and only repudiated the contracts when the prices had fallen 60%, and if it were successful in that repudiation it would throw the loss upon the sugar company.

(f) The position of the Chicago and San Francisco banks from the commencement of the action (December 1, 1920) to the final hearing (December 27, 1920).

The two San Francisco banks were parties to this action, but neither of the Chicago banks was a party.

As already appears, the Canton Bank wrote the sugar company August 13, 1920, "assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of" the letter of credit of the Great Lakes Trust Company (R. 319-320). The Canton Bank wrote the sugar company again on August 24, 1920, and October 4, 1920 (R. 320). The Canton Bank wrote the sugar company a fourth letter on the day of the commencement of this action, before the complaint had been filed, but after the alleged rescission of the contracts by the candy company (R. 291, 322). This letter was as follows:

> "San Francisco, December 1, 1920. [Addressed by the Canton Bank to appellee sugar company] Re: Great Lakes Trust Co. Credit No. 1073. In review of the complex questions which have lately arisen, we wish to advise you that we are no longer willing to negotiate drafts drawn against the above letter of credit. We communicated with you regarding it, only as a matter of courtesy to our Chicago friends, the Great Lakes Trust Co. We therefore do not feel justified in deciding any technical questions which might arise at the time drafts are presented." (R. 291-292.)

In other words, the Canton Bank took the position expressed by its counsel at the trial (R. 135), that by none of the letters which it had written to the sugar company was it bound to negotiate the drafts for the account of its correspondent, the Great Lakes Trust Company.

On the other hand, the First National Bank of San Francisco admitted that by its correspondence it did, and had intended to make itself an obligor in respect

of the obligations of the First National Bank of Chicago (see letter June 8, 1920, R. 137-141).[6]

As already stated, the action was commenced December 1, 1920, and a restraining order was obtained which remained in force until December 8, 1920, when it was superseded by an order of temporary injunction (R. 296-304). Two days later the First National Bank of San Francisco wrote the sugar company advising it that but for the embarrassment under which it labored in consequence of the injunction, the First National Bank of Chicago stood ready to pay the drafts (R. 137-139).

December 22, 1920, the sugar company had its drafts and shipping documents in order and presented them to the Canton Bank and the First National Bank (see these drafts in full, R. 284-285). As the Canton Bank had declined the status of correspondent or representative of the Great Lakes Trust Company in respect of

---

6 The letter of credit of The First National Bank of Chicago (supra, pp. 6-7) says that "this credit is confirmed and irrevocable". There is no doubt that it was an irrevocable letter of credit and that it became a confirmed letter of credit when The First National Bank of San Francisco assumed liability therefor.

> "Credits are also classified as confirmed and unconfirmed; and by many the distinction between a confirmed and irrevocable credit is not clearly understood. Where a foreign bank opens a credit in favor of an American seller of goods to be exported, it usually cables its advice of the credit to its American correspondent, which, in turn, advises the seller that it has received this cable credit from the opening bank. The credit may be revocable or irrevocable upon the part of the foreign opening bank. The American bank merely transmits the message for its foreign correspondent, assuming no liability on its own part. If, however, the American seller is not willing to rely upon the irrevocable credit of a foreign bank, he may ask the American bank itself to agree to honor his drafts. If the American bank agrees to do this, the American seller has not only the irrevocable obligation of the foreign bank but the confirmation of the American bank; and the credit is both irrevocable and confirmed." (*Documentary Letters of Credit*, Carl A. Mead, 22 Columbia Law Review, 299, issue of April, 1922.)

the matters here involved the sugar company communicated by telegraph directly with the Great Lakes Trust Company at Chicago, and what occurred between them is shown by telegrams dated (a) San Francisco, December 22, 1920 (R. 130); (b) Chicago, December 23, 1920 (R. 128); (c) San Francisco, December 23, 1920 (R. 132); (d) Chicago, December 24, 1920 (R. 129); and (e) San Francisco, December 24, 1920 (R. 132).

These telegrams all show that but for the existence of the order of temporary injunction, the Great Lakes Trust Company would have paid the draft drawn upon it. The First National Bank of Chicago and the First National Bank of San Francisco stood ready to pay the other two drafts and would have done so but for the interpretation which was put upon the order of temporary injunction by counsel for the First National Bank of San Francisco (see its letter, December 23, 1920, R. 292-294; also Mr. McEnerney's remarks, R. 141).

It is thus to be seen that with a full knowledge of all the facts and circumstances, the two Chicago banks were prepared to honor our drafts drawn on the letters of credit except for the fact that their freedom to do so was interfered with by the injunction, as interpreted by them.

(g) The drafts have been paid by the Chicago banks since the entry of the final decree.

The final decree was made December 28, 1920, and dissolved the interlocutory injunction as of noon December 29, 1920 (R. 107, 362, 364 foot).

Immediately after the time fixed for the dissolution of the order of temporary injunction, the sugar company presented its three drafts and shipping documents at the counters of the First National Bank of San Francisco where they were paid, two of them aggregating $300,000 for the account of the First National Bank of Chicago, and the third for $255,800 for the account of the Great Lakes Trust Company, and these two banks thereupon became the owners of the shipping documents which stood in place of the 1250 tons of Java White sugar.

(h) Certain subsidiary matters in the Brief of Appellant call for and here receive correction.

There are two or three points of subsidiary significance which we will dispose of in a summary way here rather than in the main arguments presently to be made.

1. In the brief for appellant (page 2) the letters of credit are spoken of as though they emanated from the two San Francisco banks. It is to be noted, however, that they were in fact the letters of credit of the two Chicago banks.

2. Although dealt with in the brief for appellant (p. 20), "the zoning system" has nothing to do with this case. This "system" was inaugurated by the United States Sugar Equalization Board, Inc. upon its incorporation (supra, page 23). Under said system the country was divided into zones of distribution, each zone to be supplied from the nearest and most effective sources of supply. The act of December 31, 1919 (supra, page 23) which continued the corporate existence of the above Board until December 31, 1920, provided that

the system of zoning should be abolished and that sugar should freely circulate throughout the country from all sources of supply—in other words, that each manufacturer and dealer might sell his sugar in all parts of the country without being limited to any zone or territory. Obviously, therefore, neither the zoning system nor its abolition has anything to do with clauses 6 and 7 involved in the contract here under consideration.

3. In the brief for appellant (page 3) the point is made that the sugar company placed no restrictions against resale upon any of the *refined* sugar which it disposed of in its business. To this there is a two-fold and very obvious answer. The refined sugar being suited to household consumption (as well as to manufacturing purposes), was sold to jobbers whose business is to resell and whose contracts of purchase necessarily could not contain a provision against resale. The Java White sugar, being suited to manufacturing purposes *only,* was sold for use in manufacturing only, and sales of this sugar appropriately carried provisions against resale. In other words, a manufacturer has peculiar needs for sugar, namely, for his own consumption, whereas the only need a jobber has for sugar is to resell it.

Argument.

(1) A contract of sale and purchase of goods which contains a clause whereby "buyer (a manufacturer using sugar) agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same" does not violate the Sherman Act; and it was so decided in Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165 (1915).

At the outset it is to be noted that the provision in the contract whereby "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same" is a covenant of the vendee and not a condition; so that a breach would not give ground for forfeiture but merely an action by the vendor for damages. (*Hale v. Finch,* 1 Wash. T. 567; affirmed, 104 U. S. 261; *"Condition", 2 Words and Phrases* (*1st Series*), 1397; 1 *Words and Phrases* (*2nd Series*), 863.)

It is also to be noted that provisions in contracts restricting the use of commodities sold (whether such provisions be conditions or covenants) are quite common.

A manufacturer of cement may sell cement to a dealer restricting its use to the construction of a designated courthouse, and provide that "the buyer shall have no right to resell or to loan the same, or to assign this contract" (*Iola Portland Cement Co. v. Ullmann,* 159 Mo. A. 235, 241, top 248, 140 S. W. 620, 623, (1911), column 2, near bottom, 624, column 1, middle). Bankers may (as through the war) refuse credit to aid new enterprises upon the ground that the banking resources

of the country are no more than adequate to protect existing enterprises and the more pressing requirements of the times. Manufacturers may limit their sales to ultimate consumers only (*Ford Motor Co. v. Boone*, 244 Fed. 335, 340), or to wholesalers only (*Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46). License laws in this country (before prohibition) and in England created a taxed class of those who dealt in food and drink to be consumed on the premises. Passing from personal property to real property we may note the frequent sale of real property with important restrictions concerning building etc.

We have not been able to find any decision declaring that a contract for the sale of commodities wherein the buyer agrees that the goods are purchased for his own consumption and not for resale is invalid—in fact, the authority to impose such a restriction arises out of the right of the owner of the commodity to withhold it from sale, and if he sell, to impose conditions in respect thereof.

> "As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy." (*Smith v. S. F. & N. P. Ry. Co.*, 115 Cal. 584, 605. 1897.)

> "Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it may see fit. It may decline to deal with the trade at all, and dispensing with middlemen, sell directly to users, by mail, or

through traveling salesmen or local agents. Accordingly it may lawfully appoint an agent at Portland authorized to sell its cars, limiting his authority to sales within a prescribed territory, and to users, and for a fixed price; and it may impose as one of the conditions of sale that it will not pass title except to the ultimate user and after such price has been paid in full.'' (*Ford Motor Co. v. Boone,* 244 Fed. 335, 340, C. C. A. 9th Ct. 1917.)

''I am unable to see any inequity or violation of public policy in the agreement by the purchaser of a chattel that he will not resell it within a reasonable period. The purchaser gets all that was offered him, and all that he paid for, and the vendor maintains the market price by an agreement that the purchaser will not compete with him by selling the book within a limited period. To consider this as an unlawful agreement in restraint of trade would be straining the matter.'' (*Authors & Newspapers Ass'n v. O'Gorman Co.,* 147 Fed. 616, 620 C. Ct. Rhode Island, Brown, D. J., 1906.)

'' 'Parties to contracts have the right to insert any stipulations that may be agreed to, provided that they be neither unconscionable, nor contrary to public policy.' * * * 'One may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights.' * * * 'It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It is well said by Sir George Jessel, M. R., in Printing, etc., Co. v. Sampson, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those

> rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.' " (Quotations made by this Court in *Robinson v. Thurston*, 248 Fed. 420, 423-424. 1897.)

In this case there is no element whatever of a restraint of trade. The candy company was a manufacturer of commodities requiring sugar and not a dealer in sugar. The sale here involved facilitated its trade as a manufacturer (which it was) and cannot be said to have restrained its trade as a dealer (which it was not). The amount of sugar involved was less than one-fourth of the estimated annual requirement of the candy company. Even in the events which happened the restriction imposed was not burdensome for no other sugar purchased by the candy company carried an agreement against resale (R. 235). It might therefore have sold the other sugar—in fact did so (R. 235) —and used the sugar here involved in its business as a manufacturer and thereby promoted its own trade.

The fall in the price of sugar, however, put it in a position where it could buy other sugar at a much lower price than the price for which it had agreed to pay for the sugar here involved. Therefore, instead of utilizing the sugar for its legitimate business it sought to repudiate its contracts.

As already stated, we have found no case to justify an argument that a contract for the sale of commodities is invalid if it is agreed by the buyer that the commodity is for its own consumption and not for resale. On the other hand, it has been explicitly decided by the United States Supreme Court that such a contract is not invalid.

Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, was a suit brought in Georgia by the above named refining company against the above named manufacturing company to recover the contract price of two lots of glucose or corn syrup. In its answer, the defendant pleaded, among other things, that the contract was invalid under the Sherman Law because it contained a clause that the goods were sold "for your [buyers] own consumption only, and not for resale". The answer was stricken out as one presenting no defense and judgment entered for the plaintiff. The Court of Appeals of Georgia affirmed the judgment (11 Ga. App. 588, 75 S. E. 918), and its decision was in turn affirmed by the United States Supreme Court (236 U. S. 165).

In disposing of the defense based upon the above provision in the contract, i. e., "for the [buyers] own consumption only, and not for resale", the Court of Appeals of Georgia said:

> "It is further alleged in the answer that each order for goods bought by the defendant contained a clause reciting that the goods are sold 'for your own consumption only, and not for resale'. A covenant by the buyer of property not to use the same in competition with the business retained by

the seller has been held to be valid. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. Ed. 122, citing Hitchcock v. Anthony, 83 Fed. 799, 28 C. C. A. 80, and American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634. If not valid, it is incapable of enforcement, and does not restrain the purchaser from reselling the goods at his pleasure.'' (11 Ga. App. 602, 75 S. E. 924, c. 2 foot.)

A writ of error was sued out of the United States Supreme Court and in narrating the proceedings below, that court said:

''On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the manufacturing company for the price of the goods, as sued for, * * * This judgment was affirmed by the court below. (11 Ga. App. 588, 75 S. E. 918), and because of an assumed failure to give effect to the anti-trust act of Congress this writ of error was prosecuted.'' (236 U. S. 171.)

The court then dealt with the defenses set up by the manufacturing company, and speaking of the provision ''for your [buyers] own consumption only, and not for resale'', said:

''The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to * * * the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we

can see no ground whatever for holding that the contract of sale was illegal because of these conditions." (236 U. S. 172-173.)

Thus we have the decision of the United States Supreme Court that a contract of sale which contains a provision that the goods are sold "for your [buyers] own consumption only, and not for resale" does not violate the Sherman Act.

In line with the foregoing we cite the following additional cases.

In *Phillips v. Iola Portland Cement Co.,* 125 Fed. 593 (C. C. A. 8th Ct. 1903), the company, a Kansas manufacturer of cement, recovered damages from Phillips for the breach of a contract of sale of cement which had been made by the company with Parr & Company of Texas, of which firm Phillips was a member.

In breach of its agreement the purchaser refused to accept and pay for the cement, and Phillips, the only defendant served with process, defended upon the ground that the contract was illegal under the Sherman Law because it provided that Parr & Company should not sell the cement, ship it, or allow it to be shipped outside the State of Texas.

The court held that the defense was without merit and said:

> "* * * the facts of the case in hand leave no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by com-

> peting manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890.'' (p. 595.)

Meyer v. Estes, 164 Mass. 457, 41 N. E. 683 (1895), was an action for damages arising out of the sale by the plaintiff to the defendants of electrotype plates. The defendants were publishers of books and they agreed not to sell the plates to other parties or to multiply them for the purpose of sale. In violation of this agreement they sold the plates to Houghton, Mifflin & Co.

The court held that the latter was unaffected by the agreement but that the defendants were liable for damages consequent upon their violation of the covenant.

In the opinion it is said:

> ''It sufficiently appears that the plaintiff, at the date of the agreement, was the general owner

of the plates, and of the right to multiply, sell, and use them, and that in his dealings with the defendants he required an agreement on their part that they would use them only in their own publications, and would not sell them, or multiply them for the purpose of selling them, in order that he might have the opportunity of selling the plates to other persons who might wish to use them in their publications, or might be able to protect persons to whom he had already sold the right to use the plates. It does not appear that the plates or the prints from them were protected, or could have been protected, by a copyright in the United States, but the plaintiff meant to accomplish much the same result, in requiring this agreement from the defendants, as could be reached under a copyright law by a license. It is not entirely clear from the agreement whether the plates were sold absolutely to the defendants, or were let to them to be used in a particular way. The prints, after they had been published, unless protected by a copyright, could be copied by any one, and plates could be engraved and electrotype plates made; but this would be a costly process when compared with that of multiplying the plates. We think that the evidence shows that the plates were sold to the defendants so that the title passed to them. The agreement on their part not to sell them to other parties, nor to multiply them for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of opinion that such an agreement is reasonable, and one which ought to be enforced between the parties to it. See Publishing Co. v. Smythe, 27 Fed. 914; Clemens v. Estes, 22 Fed. 899; Parton v. Prang, 3 Cliff, 537, Fed. Cas. No. 10,784. The price to be paid for the plates, if they were to become the absolute property of the purchaser, without any restriction upon the use to be made of them, might reasonably be more than if they were purchased under such an agreement

> as is the foundation of this suit. It must be considered that the title of Houghton, Mifflin & Co., and their right to use the plates, are unaffected by this agreement; and therefore it is impossible to say, on the facts and evidence reported, that the defendants are liable only in nominal damages." (pp. 685-686.)

Anthony v. Hitchcock, 71 Fed. 659 (C. Ct. Mich., Severens, D. J., 1896), held that a complaint for damages stated a cause of action. The plaintiff alleged that he conducted a coal and fish business at a dock on a navigable river; that he was the owner of adjoining land suitable for carrying on a similar business; that he sold the land to the defendant who agreed not to buy or sell coal or traffic in the buying or selling of fish, and not to do anything that would conflict with the coal or fish business of the plaintiff. Later, the defendant leased the property thus purchased to a firm of coal dealers for the purpose of carrying on a coal and fish business, in competition with that of the plaintiff, to his damage.

Held, that it could not be adjudged that the contract, as alleged, was contrary to public policy, as being in restraint of trade, and that, upon such declaration, it appeared that the plaintiff had a good cause of action.

In the course of the opinion it is said that

> "the modern decisions seem to be settling down upon the test whether the restriction is one limited to the protection of the plaintiff's business. If it is, it is recognized as reasonable and lawful; and otherwise if not so limited." (p. 661.)

It is to be noted that the decisions speak of restrictions for the protection of the business of the seller. This language was employed in cases where the dominant idea was the protection of the business of the seller. In our case the position was unique. The restriction was requested by the Government with a view to the general welfare, but the restrictions are amply justified as appropriate to the protection of the business of the seller. The sugar company anticipating a shortage wished to secure as large a supply as possible wherewith to serve its clients and customers. This was calculated to promote its business reputation and maintain and enlarge the good-will of its business and any course which it took in that matter was clearly within its right, and in addition it served the public interests. Moreover, the sugar company had the lawful right to refuse to sell to any dealer in sugar and as incidental to that right was entitled to exact from any buyer an agreement that he would use the sugar in his own business or for his own needs and not for resale. (*Raymond Bros.-Clark Co. v. Federal Trade Commission,* 280 Fed. 529; C. C. A. 8th Ct. 1922.) In these circumstances, obviously the restriction could not be said to involve a violation of the anti-trust laws for they are designed to fit totally different situations.

> "It was held in the Standard Oil Case [221 U. S. 1] that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or

which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." (*United States v. American Tobacco Co.,* 221 U. S. 106, 179.)

"Those [the Standard Oil and Tobacco] cases may be taken to have established that only such contracts and combinations are within the act, as by reason of intent or the inherent nature of the contemplated acts, prejudiced the public interests by unduly restricting competition or unduly obstructing the course of trade, 221 U. S. 179." (*Nash v. United States,* 229 U. S. 373, 376.)

In considering the validity of clause 6 the following matters are to be taken into account:

(a) The sugar company had the right to refuse to sell the sugar to any person except a manufacturer. (See authorities pp. 64-66.) The covenant of such a buyer that he would use the sugar for his manufacturing needs only and necessarily and consequently that he would not resell are mere incidents to enforce the right of the sugar company to sell to manufacturers only. All covenants incidental to the right of the sugar company to choose its own customers are necessarily lawful (280 Fed. 532, line 8).

(b) There was nothing illegal or immoral in the objective of the clauses, i. e., there is nothing unlawful in the use of the sugar for manufacturing purposes only. The appellant's argument for illegality is that it restricted the buyer to one of several lawful uses of the commodity.

(c) The restrictions were calculated to bring about economy in buying which would be most desirable in time of scarcity. A manufacturer who knew that he was purchasing only because he was a manufacturer and who had covenanted to use the sugar for his own manufacturing needs would see to it that he did not buy more sugar than would be absorbed in the operation of his business.

(d) The supposititious results conjured up by the appellant have no place in this discussion. The contracts are to be judged by the circumstances which existed when they were made, not by unexpected events which later transpired nor by supposititious cases. "Legal puzzles which might well distract a theorist may easily be conceived." (Quoted in 67 Fed. 318.)

(e) Restrictions on the use of commodities and on the use of real property are frequently but inaccurately spoken of as restraints of trade. Judges have had occasion to note that they are not properly described as restraints of trade and they are only called restraints of trade because there are analogies in the law relating to such restrictions and to true restraints of trade. The Sherman law deals with true restraints of trade and not with restrictions upon the use of property.

(f) Throughout the discussion we speak of 10,000 tons as though that amount was involved in the transaction. The pleadings deal only with 1250 tons and the 10,000 tons merely came into the case at the final hearing. The plaintiff's case rests upon the idea that the contract would be invalid even if it only involved 10 tons.

(g) There is a difference between illegality and unenforcibility. Some restrictions might be unenforcible because the detriment to the seller was too remote but that would not make them illegal nor infect a main contract to which they were mere incidents.

(2) If the contract of sale and purchase here involved does not violate the Sherman law it does not violate any other law invoked by appellant. Moreover the contract does not violate any law whatever.

In the brief for appellant (pages 14 and 15) the appellant invokes the provisions in the Wilson Tariff Act of August 27, 1894 (28 St. 570), as amended February 12, 1913 (37 St. 667), as a law violated by this contract.

The effect of the Wilson Act is to apply the provisions of the Sherman law to trade between foreign countries and this country. If the contract in this case affecting a shipment from San Francisco to Chicago does not violate the Sherman law the contract would not have violated the Wilson Act even if the sugar had been imported by us from a foreign country. We might say in passing, although it is unimportant, that we were not the importers of this sugar but bought from those who did import. This is a matter of minor consequence, however, because as it has been decided that an agreement by a buyer to use a commodity purchased for his own needs does not violate the Sherman law, it is equally clear that it does not violate the Wilson Act.

There is nothing whatever in the Lever Act of which the contract is a violation. One of the fundamental ideas of the Lever Act was an equitable distribution of

sugar, and, therefore, the spirit which underlies the Lever Act would have justified any right minded dealer in sugar under the circumstances of this case in insisting upon the covenant from the buyer which was required by the sugar company in respect of sales of the 10,000 tons of Java White sugar.

The complainant has not attacked the contracts here involved as violative of any law except an act of Congress. Complainant has not claimed that the contracts violated any statutory law of California or any unwritten law. If this clause violated California law the restriction would only be unlawful to the extent that the restraint was unreasonable and the main agreement would be legal and enforcible. (See Sections 1673, 1674, California Civil Code.)

(3) In the absence of a contract the sugar company was under no obligation whatever to sell sugar to the candy company and the latter was under no obligation to buy. In these circumstances, it was not illegal for them to agree, each with the other, that there should be no additional sales and purchases between them during the then current year.

Clause 7 of the contracts was as follows:

> "7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year."

This clause was in effect an agreement between the parties that they would not deal between themselves for additional sugar within the current year. Each of the parties had power without this agreement to accomplish

the same end for without the consent of both of them there could be no sale or purchase between them. In these circumstances, it was not illegal for them to agree that they would not deal with each other in respect of additional sugar during the then current year.

> "Section 2 * * * and provided further that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (*The Clayton Act,* approved October 15, 1914, 38 St. 730.)

> "The (Sherman) Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases.' United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 614. See also Standard Oil Co. v. United States, 221 U. S. 1, 56; United States v. American Tobacco Co. 221 U. S. 106, 180; Boston Store v. American Graphophone Co. 246 U. S. 8." (*United States v. Colgate & Co.,* 250 U. S. 300, 307, 63 L. ed. 992, 997, 1919.)

> "[In the Colgate case we held that] the only act charged amounted to the exercise of the right of the trader, or manufacturer, engaged in private

business, to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell, and that thus interpreted no act was charged in the indictment which amounted to a violation of the Sherman Act prohibiting monopolies, contracts, combinations, and conspiracies in restraint of interstate commerce.'' (*Federal Trade Commission v. Beech-Nut Packing Co.,* 42 Sup. Ct. 150, 154, column 1, top. 1922.)

''There was in that [the Colgate] case no evidence of a purpose to maintain a monopoly and restrain trade by means of restrictive agreements. In a word, all that was done by the decision in the Colgate case, as we read the opinion, was to preserve a producer's right of freedom to trade—lawfully.'' (*Victor Co. v. Kemeny,* 271 Fed. 810, 817, C. C. A. 3rd Ct. 1921.)

''It is the settled law that the individual dealer may select his own customers for reasons sufficient to himself, and he may refuse to deal with a proposed customer who he thinks is acting unfairly and is trying to undermine his trade.'' (*Western Sugar Refinery Co. v. Federal Trade Commission,* 275 Fed. 725, 733, C. C. A. 9th Ct. 1921.)

''In the conduct of its business [defendant Cream of Wheat Co.], decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. * * * The Clayton Act itself expressly recognizes the existence of this right. Under the rule which defendant [Cream of Wheat Co.] had legitimately established for the conduct of its own business, complainant could not buy from it, because complainant was a retailer. * * * There was no contract between the two which bound defendant [Cream of Wheat Co.] to

sell to complainant. * * * We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice'. Cooley on Torts, p. 278." (*Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 48; C. C. A. 2nd Ct. 1915.)

"A wholesaler has the right to purchase merchandise or refuse to purchase it from any person he chooses, and for any reason, or no reason at all, and to refuse to make further purchases from a manufacturer, unless that manufacturer agrees to cease selling to another wholesaler, who was also engaged in the retail business, without being guilty of unfair methods of competition, contrary to the Federal Trade Commission Act." (*Syl. Raymond Bros.-Clark Co. v. Federal Trade Commission,* 280 Fed. 529; C. C. A. 8th Ct. 1922.)

(4) Considering the circumstances under which the contracts were made and the clauses introduced, there is no invalidity in either of them regardless of their validity when abstractly considered.

In support of this point we invite attention to the opinion rendered by Judge Bledsoe in deciding the case (270 Fed. 302, R. 90, 344), upon which the point might be safely rested. We add some suggestions, however.

In the present case there was no purpose to create a monopoly or to restrain trade. The object of the clauses under consideration was to secure an equitable

distribution of sugar. Anticipating a shortage and also moved by strikes, etc. in the Hawaiian Islands calculating to reduce its importation of cane sugar from those islands, the sugar company imported this peculiar sugar in order that it might help to take care of the requirements of its customers.

The sugar company having in hand sugar peculiarly suited for use in the manufacture of commodities requiring sugar and not suited for household use, the right minded course for it to take was what the Government requested it to take—to sell this sugar only to manufacturers for their own use, thereby in part satisfying their sugar requirements and at the same time relieving the strain on sugar suited for household consumption. Such a course was calculated to promote the public welfare and to serve its own personal interests, i. e., the care of its customers during a period of shortage and its right to sell to manufacturers only.

The language of the Food Control Act and of the proclamations of the President and the regulations of the Government all called for the equitable distribution of commodities.

The testimony of Mrs. Adams, United States Attorney at San Francisco, shows that the course of the Government was quite in keeping with the public welfare, and the Attorney General's Report, 1920, pages 180 to 185, copied here (R. p. 308) shows that the provisions were called for by the exigencies respecting sugar.

It is clear that the acts here under review did not restrain trade within the meaning of the anti-trust

decisions which have annulled contracts, agreements, combinations, etc., "which either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade" (supra p. 60), because "the evident purpose" of the acts here under review was not to restrain trade but to minimize the injury to the public due to a shortage of sugar. Unless, therefore, it can be shown that the contracts here involved injuriously restrained trade "because of their inherent nature or effect" there is nothing in the case. The telegram of the sugar company to its brokers sent May 5, 1920, explains the whole situation (supra p. 31) and conclusively shows that the inherent nature or effect of the contracts was not such as to injuriously restrain trade.

The Java White sugar was peculiarly adapted to the requirements of manufacturers. If the manufacturers could be induced to take that sugar and employ it for their own manufacturing needs there would be a larger amount of sugar available for sale through jobbers, retailers, etc., for household consumption. In these circumstances it was a duty which the sugar company owed to the public to sell this particular lot of sugar to manufacturers for their own manufacturing needs, if that was possible. It did so. The circumstances were ample justification for their so doing even if the motive had been merely to satisfy the request of the government in that particular. In such a case the motive would not limit the right which the sugar company had to impose the condition. As an owner of commodities it had the right to impose these conditions because the

disposition of the sugar in this particular way (a) enhanced the reputation of the sugar company as one having power to meet the needs of its customers in periods of scarcity, and (b) the sugar company was thus effecting a sale of a peculiar sugar to manufacturers to whose use this particular sugar was well suited. There was a special price put upon the Java White sugar by the sugar company—19.85 cents per pound, and the entire 10,000 pounds was sold at that price. Refined sugar was nearly three cents per pound higher. In thus making a special rate for the Java White sugar (a rate lower than the price of refined sugar) the sugar company was entitled to insist that the persons to whom it sold the sugar should use it for their own manufacturing needs and not for resale.

The primary purpose of the restriction against resale was to prevent the manufacturer from buying more than his manufacturing requirements. It is also to be kept in mind that when the contracts were made both parties were acting in good faith. The candy company bought because it believed it would need the amount of sugar for which it contracted during the ensuing year and did not regard itself as a dealer in sugar presently or potentially for if it had regarded itself as a dealer in sugar it would have taken out a license for which it did not apply until June 30, 1920.

The price fixing cases are not pertinent to the question here involved. In those cases a manufacturer of an article of general use, whether patented or not patented, put the article out in trade and it came into the hands of innumerable dealers to sell to the general pub-

lic. The manufacturer sought to stabilize his output by insisting that each dealer should sell the article for the same price. The courts held that this destroyed competition in respect of this article of general use in trade, or substantially impaired competition and therefore violated the anti-trust laws in those particular cases.

In this case the commodity was not put out in trade but was sold to be used for a particular purpose and when used for that particular purpose there was no restriction whatever upon trading in the commodity created by the manufacturer. The restriction was in the interest of the public, had to do with a passing phase, was prompted by a well thought out and entirely justifiable policy of the government and inflicted no injury upon anyone. Moreover, the commodity involved in this particular case was less than one thirty-second of one per cent. of the entire sugar trade of the country, and all the sugar that was put out under these restrictions amounted to less than one-fourth of one per cent. of the annual consumption of sugar in the country. In addition to this it was only 2.7% of the output of the sugar company. In these circumstances, the restrictions were justified in morals and in law.

(5) In view of their very nature and the circumstances under which they were introduced into the contracts, the clauses are separable and the contracts of purchase and sale were enforcible notwithstanding those clauses.

We submit that we have already shown that the circumstances under which these clauses were introduced, without more, made them reasonable in their nature and entirely valid.

We come now to a different point and that is that even if those clauses were invalid, nevertheless the very circumstances of the case make the clauses separable from the main purpose of the contract which was the purchase and sale of sugar. The buyer had been informed that the government had requested the introduction of these clauses into the contract and that the sugar company had inserted them in harmony with the purpose of the government which was to secure an equitable distribution of sugar. The candy company was well aware that that was not an integral part of the consideration by which the sugar company was actuated but was in designed harmony with a governmental request, in the economic soundness of which the sugar company concurred.

As we have already pointed out, clause 6 was not a condition to the sale; it was a mere covenant by the buyer for which there would be a remedy in damages only to the vendor. This clause and clause 7 were inserted in the contract at the request of the government (see telegram, supra, page 31), and as previously stated the candy company was aware of that fact (supra, page 33 top).

> "Nothing is consideration that is not regarded as such by both parties." (*Dougherty v. Salt,* 227 N. Y. 220, 125 N. E. 94, 95 [1919] and cases cited.)

> "The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not

encouraged by the cases." (Cincinnati Company v. Bay, 200 U. S. 179, 185.)

See also the following cases, which clearly demonstrate that the clauses are separable and that the contract is enforcible notwithstanding those clauses:

Oregon Steam Navigation Co. v. Winsor, 87 U. S. (20 Wall) 64;

Pacific Wharf and Storage Co. v. Standard American Dredging Company, 184 Cal. 21, 192 Pac. 847 (1920);

U. S. Consolidated Seeded Raisin Co. v. Griffen Co., 126 Fed. 364 (C. C. A. 9th Ct. 1903);

Hall Manufacturing Co. v. Western Steel and Iron Works, 227 Fed. 588, 593 (C. C. A. 7th Ct. 1915);

Hedges v. Frink, 174 Cal. 552 (1917);

McCall Co. v. Hughes, 102 Miss. 375, 59 So. 794 (1912);

McCall Co. v. Parsons etc. Co., 107 Miss. 865, 66 So. 274 (1914);

Packard v. Byrd, 73 S. C. 1, 51 S. E. 678 (1905);

Faist v. Dahl, 86 Neb. 669, 126 N. W. 84 (1910);

Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N. E. 834 (1920);

In re Johnson, 224 Fed. 180, 186 (D. Ct. Wash. 1915);

Central New York Tel. & Tel. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206 (1910);

Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522 (1916).

(6) The contracts between the Chicago banks and the seller were independent of the contract between the buyer and the seller and even if the latter were illegal there would be no illegality in the former.

In the fall of 1920 there was an epidemic of repudiation by the buyers of commodities contracted for in the spring and awaiting delivery in the late fall or early summer all due to a drop in price. Dishonor of obligations assumed such proportions that it took on the appearance of a national calamity and was dealt with in the financial and trade journals of the country as well as in the leading journals of general circulation in the country. The banking interests of the country endeavored to disassociate themselves from this epidemic of dishonor and gave wide circulation to the fact that if the documents of the seller were in order drafts upon letters of credit would be duly honored regardless of the position taken by buyers. This did not mean, of course, that banks would pay drafts drawn upon their letters of credit if the documents and drafts were not in order and in time, but that if they were in order and in time they would be paid even though there were arrangements between the sellers and the buyers which the latter were claiming had not been fulfilled by the former. The position of the banks was based upon the proposition that the contract between the bank and the seller was a contract independent of and distinct from the contract between the seller and the buyer and that if the documents were in order the bank would pay and had a valid recourse over against the buyer. This brought

into striking relief the fact that when there is a sale of commodities there may be agreements between the sellers and the buyers which are not carried into the letters of credit, and the banks insisted that they stood upon the terms of their letters of credit.

> "It is now well settled that the letter of credit is an entirely distinct contract from the underlying contract of sale, in aid of which it is issued. The bank is liable only upon its letter of credit and is not concerned with or bound to enforce any of the provisions of the sale contract, which are not incorporated in its letter of credit.
>
> In a falling market, such as has recently prevailed, a buyer is tempted to seek some pretext for refusal to pay and a seller, who is unable to perform his contract, is equally tempted to make a shipment which does not comply with its provisions, in the hope that he may be paid under the letter of credit. These conditions make the position of a bank, which desires to carry out its credit contract in good faith, a very difficult one, since it is bound, at its peril, to determine correctly the respective rights of the buyer and seller under the letter of credit.
>
> Scores of suits have recently been brought by buyers in New York against their vendors and the banks to enjoin the beneficiaries of their letters of credit from drawing drafts hereunder and to enjoin the banks from paying such drafts, if drawn. In none of these cases was this relief granted, the courts uniformly holding that the bank must pay in accordance with the terms of the letter of credit and that the buyer must look for his remedy to an action upon his contract of sale." ("*Documentary Letters of Credit*", Carl A. Mead, 22 Columbia Law Review, 297, 311, issue of April, 1922.)

> "The authorities are uniform to the effect that this letter of credit constitutes the sole contract

with the shipper and that the bank issuing the letter of credit has no concern with any question which may arise between the vendor and vendee of the merchandise for the purchase price for which the letter of credit was issued.'' [Citing cases.] (*Lamborn v. Lake Shore Banking Co.,* 196 App. Div. 504, 506, 188 N. Y. Supp. 162, 163 (1921).

''The letter of credit upon which this action is based was a complete and independent contract between the plaintiff shipper and the defendant bank which issued it based upon a valuable consideration.'' [Citing cases.] (*Doelger v. Battery Park National Bank,* 201 App. Div. 515, 521, 194 N. Y. Supp. 582, 587 (1922).

''A bank issuing an irrevocable letter of credit at buyer's request, whereby it agreed to accept drafts attached to bills of lading drawn by seller, *was in no way concerned with any contract existing between the buyer and seller,* and, if buyer rejected goods, the bank's remedy was to sell the goods, and, if insufficient was realized thereon to cover its advances, it had recourse to the buyer for the difference, but could not recover from the seller.'' (*Syl. Imbrie v. D. Nagase & Co.,* 196 App. Div. 380, 187 N. Y. Supp. 692 (1921).

''When the bank issued this letter of credit it did not purchase goods. It agreed to purchase documents, in the sense that it would pay on receipt of certain documents, which should conform in every respect with the requirements of the letter of credit. It was, of course, not concerned with the goods, but with the documents. It would gravely impair the business of issuing letters of credit, if banks were required to construe the documents involved and determine arguable questions.

''The only safe rule for a bank is to refuse to pay, if, by omitting, as here, a distinct and clearly ex-

pressed provision, the documents do not conform with the letter of credit. Bank of Montreal v. Recknagle, 109 N. Y. 482, 17 N. E. 217." (*International Banking Corporation v. Irving National Bank,* 274 Fed. 122, 125 (D. Ct. N. Y. 1921, Mayer, D. J.).

"This is an action to recover * * * upon a draft drawn by the plaintiff [the seller] upon the defendant, [the bank] and presented to the latter for payment. * * * Payment was refused for a reason presently to be stated. The draft was drawn pursuant to a letter of irrevocable export credit issued [to the plaintiff] by defendant. * * *

The complaint alleges that the letter of credit was issued by defendant to plaintiff for a valuable consideration received by defendant, as an inducement to plaintiff to enter into and perform a contract for the sale of tin plate made between plaintiff [the seller] and the [buyer thereof] * * * It also alleges that plaintiff duly sold and shipped to the [buyer] * * * the merchandise above referred to, and the plaintiff duly presented its draft to the defendant at its New York office * * * accompanied by bills of lading covering said shipment, issued to order, indorsed in blank, and invoices, all as required by the irrevocable letter of credit. * * *

The defendant in its answer, in addition to a general denial, set up three affirmative defenses. * * * The second defense alleged that, by reason of federal prohibition of exports from the United States of tin plates, the performance of the contract between the plaintiff [seller] and the [buyer] * * * became impossible of execution, inasmuch as the [buyer] * * * was unable to obtain a license permitting the export of the merchandise within the time required by the contract. * * *.

Letters of credit have long been known to the commercial law, and the principles which govern them are well established. * * * These letters are general or special. They are general, if di-

rected to the writer's correspondents generally. They are special, if, as in the case at bar, they are addressed to some particular person. If the letter is addressed to a particular person, who advances goods or money on it in accordance with its tenor, the letter becomes an available promise in favor of the person making the advance. When acted on, and the advances made in accordance with its terms, a contract is created between the writer of the letter and the party who has acted upon it, upon which an action can be maintained. * * *

The second defense, that the contract become impossible of execution, inasmuch as the [buyer] * * * was unable to obtain a license from the United States government permitting the export of the tin plate, is wholly inconsequential. The liability of the bank on the letter of credit as agreed upon between plaintiff and defendant was absolute from the time it was issued, and it was quite immaterial whether the defendant could export the tin or not. The law is that a bank issuing a letter of credit like the one here involved cannot justify its refusal to honor its obligations by reason of the contract relations existing between the bank and its depositor [the buyer] * * *.

There is but one vital question involved in this case. It is whether the letter of credit already set forth herein is a complete and independent contract between the plaintiff and the defendant. This court is satisfied that it is, and that by it the defendant gave authority to the plaintiff to draw upon it * * * and impliedly promised to pay drafts so drawn, when accompanied by certain specific documents, to wit, the invoices and bills of lading, provided the drafts were drawn and

presented prior to the expiration of the credit. * *

The defendant in effect seeks to read into the contract a provision that the plaintiff's rights under the letter of credit should be subject to the superior right of the [buyer] * * * to modify the contract which the bank had made with the plaintiff. We do not so understand the law." (*American Steel Co. v. Irving,* 266 Fed. 41-44, C. C. A. 2nd Ct. 1920.)[7]

"The plaintiff having failed to show the facts upon which the liability of the defendant on the guaranty depended, was not entitled to recover; and, if the defendant had paid the draft without its being in form showing compliance with the terms of the guaranty, and without the presentation of a bill of lading or shipping receipt issued by the express company showing shipment of eggs of the description specified in the guaranty, it might not have been able to recover of the drawees. (Bank of Montreal v. Recknagel, 109 N. Y. 482; Lamborn v. Lake Shore Banking & Trust Co., 196 App. Div. 504; affd. 231 N. Y. 616; Germania Nat. Bank v. Taaks, 101 id. 442; * * * Bank of Italy v. Merchants Nat. Bank, supra; International Banking Corp. v. Irving Nat. Bank, 274 Fed. Rep. 122.)" (*Portuguese American Bank v. Atlantic National Bank,* 200 App. Div. 575, 577, 193 N. Y. Supp. 423, 425 (1922).

See, also:

Frey & Son, Inc. v. E. R. Sherburne Co., 193 App. Div. 849, 184 N. Y. Supp. 661 (1920);

[7] The first trial resulted in a judgment for the defendant bank which was reversed in the above decision (266 Fed. 41). The second trial resulted in a judgment for the plaintiff steel company which was affirmed (277 Fed. 1016, C. C. A. 2nd Ct. 1921), and Certiorari denied (42 Sup. Ct. 271, 66 L. ed. 360, 1922).

Germania National Bank v. Taaks, 101 N. Y. 442, 5 N. E. 76 (1886);

Bank of Italy v. Merchants National Bank, 197 App. Div. 150, 152, 188 N. Y. Supp. 183, 184 (1921), affirming 113 Misc. 314, 185 N. Y. Supp. 43 (1921);

Bank of Taiwan v. Gorgas-Pierie Mfg. Co, 273 Fed. 660 (C. C. A. 3rd Ct. 1921);

Vaughn v. Massachusetts Hide Corporation, 209 Fed. 667 (D. Ct. Mass., Bingham, C. J., 1913);

Bank of Lumpkin v. People's Bank of Athens, 27 Ga. App. 459, 108 S. E. 835 (1921);

Bank of Plant City v. Canal-Commercial Bank, 270 Fed. 477, 481 (C. C. A. 5th Ct. 1921);

Banks and Banking, 7 C. J. 594-595.

(7) If it were held that the contracts between seller and buyer were illegal and this illegality infected the contract between the Chicago banks and the seller, then the banks were under no obligation to honor drafts drawn under the letters of credit and if they honored such drafts the banks would be volunteers in respect of payments made, and would not have recourse against the candy company.

If the contract of purchase and sale were invalid, the plaintiff would have a full and complete defense to any action by the seller thereon for the price, and therefore, so far as the contract of purchase and sale is concerned, there is no equity in the bill.

> "Where a party, if his theory of the controversy is correct, has a good defense at law to 'a purely legal demand,' he should be left to that means of defense, as he has no occasion to resort

to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." (*Cable v. U. S. Life Ins. Co.,* 191 U. S. 288, 305 ft.)

See, also:

Grand Chute v. Winegar, 82 U. S. (15 Wall.) 373 (1873);

Sunset Telephone Co. v. Williams, 162 Fed. 301 (C. C. A. 9th Ct. 1908).

Bronson v. Cook, 247 Fed. 601.

21 *Corpus Juris* 41.

Moreover, if we assume that the contracts of the banks were infected with any of the alleged illegality of the contracts of purchase and sale, then it follows that the banks had a full defense at law against the letters of credit, and that the candy company had a full defense against its contract with the banks if the banks paid.

In other words, if the contracts between the banks and the seller were infected with illegality the seller could not recover from the banks and therefore a payment by them was not obligatory but merely voluntary, and if voluntary, could not be the basis of a claim over against the buyer on his contract to reimburse the banks in respect of the letters of credit.

Payment (Voluntary): 21 R. C. L. 141; 22 A. & E. Encyc. of Law, (2nd Ed.) 609; 30 Cyc., 1298.

(8) Furthermore, considering that the Chicago banks paid the drafts and took over the shipping documents which made them the owners thereof, the case is at an end.

If we treat the contract between the banks and the seller (the sugar company) as a contract independent of and distinct from that between seller and buyer and therefore not infected with any supposed illegality in the latter contract; or consider the contract as infected and the payment by the banks voluntary and not compulsory, the case is at an end. In the latter circumstances the candy company would have been under no obligation to reimburse the banks, and therefore it could not obtain an injunction to prevent performance of a contract between the banks and the seller. The moment the banks paid the drafts and took the shipping documents they became the owners thereof (subject to the right of the buyer to take them over on reimbursing the banks). This is the point decided in *Vaughan v. Mass. Hide Corporation*, supra, page 79.

(9) As this was an action to annul a contract between the Chicago banks and the seller and as the Chicago banks were not impleaded in the cause there was an absence of indispensable parties—a point seasonably and properly made below.

Virginia Mining Co. v. Corrigan, 242 Fed. 809 (1917);

Foster's Federal Practice, 5th Ed., Vol. 1, secs. 120, 128;

Bogart v. Southern P. Co., 228 U. S. 136, 146-8 (1913);

Niles Co. v. Iron Moulders' Union, 254 U. S. 77, 65 L. Ed. 145, 41 Sup. Ct. Rep. 39 (1920).

(10) In no event would the candy company be permitted to reap the benefits of its unconscionable delay and to treat the contracts as valid while it desired the sugar and to treat them as illegal when it desired no longer to buy the sugar.

The contracts between seller and buyer in the present case were made May 14, 18, 1920. The repudiation took place December 1, 1920, although the so-called notice of rescission was dated November 30, 1920. The drop in the price of sugar commenced in the middle of July (Brown, R. 173, foot; also table of prices, R. 163). This was a world condition.

In *Frederick v. American Sugar Refining Co.,* 281 Fed. 305 (C. C. A. 4th Ct. 1922) the purchase of sugar was made on May 28, 1920, at 22½ cents per pound (p. 305), and it was sold December 21 and 22nd, 1920, at 8 cents per pound (p. 306).

As an interesting instance of repudiation of sugar contracts in 1920, we invite attention to *Franklin Sugar Refining Co. v. Hanscom,* 273 Pa. 98, 116 Atl. 140 (1922) where the seller sued the buyer for breach of a contract to purchase and pay for sugar. When the contract was made the price was high, but as it called for September and October 1920 delivery, the price fell in the meantime. The buyer defended against the action and among other things alleged that:

> "Plaintiff 'represented in substance to the trade, amongst others the defendant, that refined sugar was scarce, and that such scarcity of sugar would continue throughout the year 1920, that unless plaintiff allotted sugar to its customers pro rata, based on previous purchases, and delivered the same in accordance with such allotments, plain-

> tiff's customers would not be able to get any sugar for the balance of the year 1920, and that the price of sugar would advance to 30 cents per pound before the end of the year; that plaintiff's said plan of making allotments was a new method of selling sugar, which was introduced and used by plaintiff and others controlling the sources of supply, for the express purpose of deceiving and taking advantage of the trade, amongst others defendant, by forcing and attempting to force abnormally large purchases of sugar at high and excessive prices'." (p. 142, column 2, top.)

After thus stating the substance of defendant's pleading, the court said:

> "These allegations are of no value, because averred upon information and belief only, though made to defendant itself; are principally allegations of opinion and not of fact; and so far as they relate to the averment that the plan of making allotments was introduced for the purpose of deception, no fact is given to justify the opinion, and the method has not in itself anything from which the court could infer it. On the contrary, on its face it would appear to be a beneficial means for enabling old customers to assure themselves of a supply of sugar at a time three and four months distant, when the entire community was clamoring for it because the price had greatly advanced, and it was believed would continue so to do. Moreover, there is no averment that the alleged 'express purpose' was effective in defendant's case, in that by reason thereof it contracted for 'abnormally large purchases of sugar at high and excessive prices'. The affidavit of defense expressly admits that at this time 'sugar was in demand, and could have been sold by plaintiff, [and that] defendant did not indicate to plaintiff * * * any unwillingness on defendant's part to take the sugar', and by failing to properly deny it admits also that 'plain-

tiff could not nearly meet the demands of the trade for the prospective output of its refinery'. Beyond this, however, defendant has only itself to blame * * * if it was unwilling to buy unless protected against the possibility of a fall in price, it should have asked for a guaranty; doubtless it did not because it could not afford to take the risk of plaintiff's refusal to sell under such conditions, when it could easily have sold all the sugar obtainable, without making itself liable to market fluctuations." (p. 142, column 2.)

Other sugar cases arising out of the drop in price from the spring to the fall of 1920 are:

Franklin Sugar Refining Co. v. Howell (Pa.), 118 Atl. 109 (1922);

Kramer v. Harsch, 278 Fed. 860 (C. C. A. 3rd Ct. 1922);

Morris Joseloff Co. v. Spirt (Conn.), 117 Atl. 523 (1922);

Franklin Sugar Refining Co. v. Lykens Mercantile Co. (Pa.), 117 Atl. 780 (1922);

American Sugar Refining Co. v. Martin-Nelly Grocery Co. (W. Va.), 111 S. E. 759 (1922).

(11) Conclusion.

We respectfully submit that the decree below was in consonance with law and morals and should be affirmed.

San Francisco, October, 1922.

Respectfully submitted,

Donald Y. Campbell,
Garret W. McEnerney,
Attorneys for Appellee Sugar Company.